

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 46 of 1990

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

AMBALAL SHANABHAI VAGHELA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 46 of 1990
MR DP JOSHI for Petitioner No. 1
MS.MEETA PANCHAL APP.for Respondent No. 1
-

CORAM : HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 19/09/2003

ORAL JUDGEMENT

1 This appeal has been preferred under Section 374(2) of the Code of Criminal Procedure 1973 (for short 'Cr.P.C'.) against the judgment and order passed by the

Special Court, Ahmedabad in Special Criminal Case No. 31 of 1989 on 2.1.1990 sentencing the accused to three months Rigorous Imprisonment for an offence under Section 7 of the Essential Commodities Act, 1955 (the Act) read with Clause 3 of Kerosene (Restriction on Use and Fixation of Price) Order 1966 ('the Order').

2 The prosecution case, as culled out from the judgment under appeal, is that on 1.10.1988 at around 8.00 p.m. the complainant - Traffic Police Sub Inspector one Shri Girdharlal Ratanlal Gadhavi was on duty at Wadaj Traffic Circle. The complainant was accompanied by another traffic P.S.I. named R.D.Vala as well as other police personnel. One qualified expert from the Forensic Science Laboratory (FSL) was also present. One Rickshaw bearing RT0 Registration No.GTH 8949 (vehicle) was seen coming from Nava Wadaj side. As the vehicle was found emitting dense smoke the police personnel detained the vehicle and a small sample of the fuel from the fuel tank was collected and subjected to preliminary examination by the FSL expert. It was prima facie opinion of the FSL expert that the fuel viz. the petrol was adulterated with kerosene. Thereupon required quantity of fuel from the fuel tank was collected in presence of two panch witnesses in a bottle. The mouth of the bottle was fastened with cork. On one blank slip of plain paper the Traffic Police Sub Inspector and two panch witnesses affixed their signatures and thereafter applied seal. Panchnama in respect of the said proceeding was drawn and thereafter the complainant reduced in writing his complaint at the spot itself. Thereafter, the accused along with the vehicle, relevant papers and the bottle containing the sample fuel were forwarded to Naranpura Police Station. After carrying out necessary investigation the chargesheet was presented in the Court against the accused and as the accused pleaded not guilty to the charge the case was tried.

3 The Trial Court framed the following three issues and answered the same respectively as under :

- (1) Does the prosecution prove beyond any reasonable doubt that the accused is guilty of the offence for which he has stood charge-sheeted before this Court ?
- (2) What punishment, if any, deserves to be imposed on the accused ?
- (3) What final order ?

My answers to the above points are as under :

- (1) In the affirmative.
- (2) As per the final order.
- (3) As per final order "

4 After considering various submissions made on behalf of the accused and the evidence which has come on record, the Special Court held that the prosecution had proved beyond any reasonable doubt that the accused was guilty of the offence for which he was chargesheeted. Thereafter, the accused was heard on the question of sentence and in light of the fact that minimum punishment prescribed under Section 7 of the Act was three months imprisonment the Court sentenced the accused to three months Rigorous Imprisonment holding that there was no discretion vested in the Court levying any lesser sentence. It is against the aforesaid judgment and order that the present appeal has been preferred.

5 Mr.D.P.Joshi, learned Advocate appearing on behalf of the accused-appellant submitted that the Sessions Court had erred in finding the accused to be guilty of the offence charged with. Firstly, it was submitted that there was contradiction in the depositions of the complainant as well as prosecution witness Laljibhai i.e. panch witness; secondly, the complainant's witness Laljibhai i.e. panch witness contradicted his own statement on material points in relation to deposition in the Examination in Chief vis-a-vis deposition in the cross-examination; thirdly, the prosecution had failed to establish the complete chain by not examining all the persons involved in transferring the bottle containing sample from the point of time of seizure till the point of time when it reached the Public Analyst at FSL, which according to Mr.Joshi could lead to inference of tampering with the sample; fourthly, there was delay of 18 days which would lead to an inference of likelihood of tampering with the sample and this aspect assumes importance when one considers that a special/counter had been opened at FSL at the relevant point of time to receive bottles containing sample of alleged adulterated fuel; fifthly, the burden was on the prosecution to establish mens rea and in absence of such burden having been discharged the prosecution could not be said to have proved its case beyond reasonable doubt. In support of the aforesaid propositions the following decisions were relied upon by Mr.Joshi :

Jethaji Suvaji Vs. State of Gujarat.

(2) AIR 1980 SC 1314

The State of Rajasthan Vs. Daulat Ram.

(3) 1963(4) GLR 1031

Hanumantha Ramchandra Vs. The State of Gujarat.

6 As against this Ms.Meeta Panchal, learned APP. appearing on behalf of State submitted that it was the right of the prosecution to determine as to who should be examined. That as could be seen from the deposition of Pallaviben, (Exh.55), the FSL expert, when the bottle containing sample was received by her the seal was intact and on removal of the seal a slip (Exhibit 10) containing three signatures was recovered. As further deposed, she put her signature and case file number on the said slip. The affixing of the the signatures by the three persons on the slip Exh.10 is found to be corroborated with the deposition of the complainant and the panch witnesses. It was also submitted that no period had been prescribed for forwarding the sample to the FSL and hence the aspect of delay will have to be appreciated in light of the facts of each case; that delay per se would not be fatal to the case of the prosecution and the aspect of delay had to be appreciated considering the workload and various duties which the police personnel in particular were assigned. In relation to the variance as regards deposition of the panch witness, it was submitted that in all material aspects the said panch witness had supported the prosecution viz. that the sample had been taken in his presence, that he had accepted his signature both on the panchnama as well as forwarding slip, Exh.10 and hence the discrepancy as regards the place where the panchnama was signed was of a minor nature which did not detract from the main case of the prosecution. She relied upon the following two decisions in support of her contentions :

(1) AIR 1983 SC 753

Bharwada Bhoginbhai Hirjibhai. Vs. State of Gujarat.

(2) AIR 1988 SC 1998

State of U.P. Vs. Anil Singh.

7 In rejoinder Mr.Joshi, learned Advocate for the accused-appellant referred to Sections 100 & 102 of the Code and contended that the requirement stipulated in the

said two Sections were mandatory in nature and non compliance should result in acquittal of the accused. It was also contended that the slip (Exh.10) which was placed with the bottle containing the sample had not been signed by the accused and the accused had not been supplied with the seizure memo. These facts coupled with the delay of 18 days and the discrepancy in panchnama, according to Mr.Joshi, were fatal to the prosecution case and the appeal ought to be allowed. Reliance was placed on the following three decisions :

(1) (1968) 9 GLR 364.

The New Swadeshi Mills of Ahmedabad Ltd.
Vs. S.K.Rattan & Ors.

(2) AIR 1994 SC 1872.

State of Punjab Vs. Balbir Singh.

(3) AIR 1971 SC 1277.

Babulal Hargovindas Vs. State of Gujarat.

8 The Trial Court has considered the case of the prosecution based on the evidence in the form of deposition of the complainant Girdharlal Ratanlal Gadhavi (Exh.6), Laljibhai Karsanbhai Rathod (Panch witness Exh.8), Pallaviben Bipinbhai Thakar, Senior Scientific Assistant, FSL (Exh.12) and Laxmansinh Hirabhai Gohil, P.S.I. Naranpura Police Station (Exh.14). Over and above these, documentary evidences in the form of original complaint (Exh.7), Panchnama (Exh.9) Slip (Exh.10), Report of FSL (Exh.13), letter forwarding sample bottle to FSL (Exh.16) and office copy of the said letter (Exh.15) have also been taken into consideration. Further statement of the accused has also been recorded wherein he has denied the charges. The accused has not stepped into the witness box nor has he examined any witness in support of his defence nor has any documentary evidence except one newspaper cutting been produced on behalf of the defence.

9. The Record and Proceedings which have been requisitioned have been perused by this Court.

10 The main case of the prosecution unfolds through testimony of the complainant (Exh.6). During course of his deposition he has proved the complaint at Exh.7. In the examination in chief the complainant has stated that as various auto Rickshaws in the city of Ahmedabad were found to cause air pollution by adulterating kerosene with petrol, he along with the Police Sub Inspector R.D.Vala, Jamadar Naranbhai Nathabhai, Police Constable

Ratansinh Bhavansinh, Police Constable Natvarsinh Nathusinh were carrying out checks at Wadaj Traffic Circle on the day of the incident. That as the vehicle bearing No.GTH 8949 coming from Nava Wadaj side was found to be emitting dense smoke the same was detained and the driver was asked for his identity. It was stated that he was Ambalal Shanabhai Vaghela, Aged 31, resident of Jawahar chowk, Sabarmati. One Shri G.D.Sharma, an Expert of the FSL who was also present at that time was asked to take small sample and carry out a spot analysis to prima facie determine as to whether there was any adulteration or not in the fuel found in the fuel tank of the vehicle. As per the spot analysis report it was found that one litre of petrol was containing 375 ml.Kerosene and hence, fuel used by the vehicle was found to be adulterated in terms of Section 7 of the Act read with Clause 3 of the Order. Accordingly, in presence of two panch witnesses the required quantity of fuel was removed from the fuel tank of the vehicle in a clean empty dry bottle. The said bottle was fastened with cork and thereafter a slip (which has subsequently been exhibited as Exh.10), was pasted containing the signature of the complainant and the two panch witnesses. Thereafter, bottle containing the said sample was sealed and the entire panchnama had been drawn-up. The said witness has accepted the panchnama and stated that the same had been reduced in writing by writer constable Natvarsinh. He has identified his signature as well as the signatures of two panch witnesses along with the signature and hand writing of writer constable Natvarsing. The said witness has also accepted and identified the bottle in which the sample was collected. He has identified slip (Exh.10) containing his signature along with signatures of two panch witnesses and further deposed that the said slip is the same slip which had been pasted on the cork of the bottle before the bottle was sealed. The said witness further identified the accused who was present in the Court on the day of the deposition.

11 During the course of cross examination, a suggestion that panch witnesses were not present when the sample of the fuel was collected has been denied. Similarly a suggestion that panchnama had been drawn subsequently has also been denied. At the same time a suggestion that panchnama had already been prepared prior to detention of the vehicle and collection of the sample has also been denied. It is admitted that he does not remember the name of the police constable with whom bottle containing sample had been forwarded to Naranpura Police Station.

12 The panch witness no.1 - Laljibhai Karsanbhai in his deposition has stated that the other panch witness was named Vallabhbbhai. That the police had recovered the sample and collected the same in the bottle in their presence and thereafter obtained their signatures on slip (Exh.10) which had been affixed on the cork of the bottle before applying the seal. He has identified the original panchnama as well as his signature thereon along with the signature of other panch witness. He also accepted the contents of the panchnama on the same having been read over to him. He has identified the signatures of self and other panch witness on slip (Exh.10). He has also identified the bottle in which the sample had been collected.

13 In the cross examination he has been questioned as regards hotel which he was originally running near Mehsana Society under licence granted by Ahmedabad Municipal Corporation but as the said hotel had been demolished by the Corporation his licence had been cancelled and he accepts not having obtained a fresh licence. It is further deposed by him that till point of time he is not assigned a new shop/premises in place of his original hotel he is running his hotel without licence as per understanding arrived at with officials of the Ahmedabad Municipal Corporation. A suggestion that, because the hotel is situated near Police Chowky he is frequently asked to come as panch witness has been denied specifically. Similar suggestion that he is asked to sign on panchnama already prepared before his arrival has also been denied. He has also denied the suggestion that no procedure for collection of sample was carried out in his presence and he had merely signed the panchnama. The only discrepancy that has come on record during course of cross examination is that at one stage it is stated that he had not signed panchnama in the police chowky while subsequently he has stated that after collecting the sample of the fuel in the bottle they had gone to police chowky and had signed the panchnama after panchnama was drawn in the police chowky.

14. On the basis of this discrepancy in the deposition of the panch witness as well as discrepancy between the depositions of the complainant and the panch witness as regards the place of drawing up of the panchnama and appending signatures thereto it was contended by Mr.Joshi that entire procedure did not reflect bonafide of the prosecution and the benefit of doubt must go to the accused. Elaborating on the submission it was pointed out that once panch witness had contradicted himself as regards place where signature had

been appended to the panchnama , the entire panchnama was required to be discarded and it must be held that the prosecution had failed to prove their case against the accused beyond reasonable doubt.

15. Referring to the deposition of Pallaviben Thakar at Exh.12, it was submitted by Mr.Joshi that the said expert of the FSL has categorically stated that she is not aware as to who had delivered the bottle from the Police Station. In the cross examination she had accepted the fact that if the seal was broken and fresh seal had been applied by the police she would not be in a position to know about the same. Thus, according to Mr.Joshi likelihood of the bottle having been tampered with or possibly having been replaced, containing different sample, or possibly having been mixed with another bottle containing sample from another Rickshaw could not be ruled out and in the circumstances, the accused must get the benefit of doubt.

16. It is pertinent to note that in the deposition (Exh.12) FSL expert Pallaviben states that on 18.10.1988 her office had received a sealed bottle from Naranpura Police Station . That, along with the said bottle the FSL had received a letter from the Police Station and the same has been produced by her which has been exhibited at Exh.15. It is further deposed that seal on the bottle tallied with the seal denoted on the said forwarding letter and the seal on the bottle was found to be in order. She further deposes that upon removal of the seal the slip (Exh.10) was found attached to the cork at the bottle and she has entered file number on the said slip and put her initial. She identified the said signature and file number on the slip (Exh.10). She has presented the original analysis report (Exh.13), accepts the contents thereof and identified her signature.

17 Laxmansinh Hirabhai Gohil, P.S.I.,Naranpura Police Station has been examined at Exh.14 and he states that a bottle containing sample had been forwarded to FSL along with letter. The office copy (carbon copy of the reply letter) has been placed on record by him and exhibited at Exh.16. He identified the signature of the Traffic Branch Police Sub Inspector Shri Gadhavi as well as signature of Police Inspector, Naranpura Police Station and also the seal denoted on the said letter. In the cross examination it is stated by him that the investigation had been carried out by different police personnel at different times and that he is not aware as to where the bottle containing sample was kept between 1.10.1988 to 18.10.1988. On the basis of these averments

in the cross examination Mr.Joshi on behalf of the appellant contended that entire chain having not been established by the prosecution coupled with the delay of 18 days it ought to be held that the Sessions Court had committed an error in law in holding accused appellant to be guilty of the offence charged with.

18 The slip (Exh.10) which contains signatures of complainant and two panch witnesses has been identified and accepted by the panch witnesses as well as complainant. It has further been accepted to have been recovered after removal of the seal from the sample bottle by FSL expert Pallaviben wherein she has specifically deposed that seal was found in tact. In the circumstances, the plea on behalf of the appellant that slip (Exh.10) did not carry signature of the accused does not carry the case of the appellant any further in as much as no prejudice is shown to have been caused to the accused. Though during course of the hearing it was submitted by Mr.Joshi that in absence of the signature of the accused on the said slip (Exh.10), there was every likelihood of the bottle having been tampered with and the slip affixed afresh after obtaining fresh signatures of complainant and two panch witnesses, said contention fails to suggest, much less show, why the prosecution should go to undertake such an exercise. It is not the case, nor even suggestion on behalf of the accused appellant that either the complainant or the panch witnesses had any prior enmity with the accused which would prompt them to tamper with the contents of the sample. This is apart from the fact that this contention was not raised at the stage of the trial nor was any suggestion to the said effect made to any of the prosecution witnesses. Therefore, it is not possible to accept this contention and draw an adverse inference as submitted on behalf of the appellant in absence of any foundation having been laid.

19. Similarly the contention regarding not serving seizure memo to the accused also does not carry the case of the accused any further. It is not even the case of the appellant that any application under Section 165(5) of the Code had been made by the accused for obtaining copy of such seizure memo.

20. The contentions regarding delay of 18 days and the discrepancy in drawing/signing of panchnama are required to be appreciated cumulatively. As rightly contended on behalf of the prosecution by learned APP. no period has been prescribed for forwarding the sample to the FSL. At the same time it is true that the period

should be minimum, but what would be that period would always depend on facts of each individual case. The delay per se cannot be fatal to the case of the prosecution unless and until it is shown that the same had resulted in any prejudice being caused to the accused. It is not the case of the accused as no such contention has been raised that the delay had caused any irreversible chemical change in the contents of the sample which would result in any prejudice being caused to the accused. The submission that delay would result in distinct possibility of likelihood of tampering has also to be appreciated in the context of what has been stated hereinbefore. At the cost of repetition it need be stated that it is not even the suggestion on behalf of the appellant that either the complainant or panch witnesses were in any way inimical to the accused so as to falsely rope in the accused by causing such delay in forwarding the sample to the FSL after tampering with the sample collected.

21. This contention would have carried some weight but for the fact that even before the sample was collected for forwarding to the FSL, a small portion of the fuel collected from the fuel tank had been spot analysed by the expert of the FSL who was present there and in his prima facie opinion the fuel in the fuel tank was found adulterated. Therefore, on the basis of this prima facie finding of the FSL expert the probability of any tampering stands ruled out. The defence has nowhere challenged either the procedure for collecting initial sample, analysis of the same on the spot and the opinion rendered by said expert viz. Mr.G.D.Sharma. If this be the position, contention regarding delay and consequential likelihood of tampering, non examination of the police personnel in the chain lose their significance.

22. The contention regarding discrepancy in the place of drawing up of panchnama and the appending of signature thereon also does not assist the case of the accused appellant in as much as in all material particulars the depositions of the complainant and the panch witnesses corroborate each other and minor discrepancy does not create a situation whereby the case of the prosecution can be said to have failed.

23. As stated by the Supreme Court in the case of Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, AIR 1983 SC 753, it is not open to enter upon reappraisal or reappreciation of the evidence in the context of minor discrepancies appearing in the depositions of the

witnesses. The following observations enunciating the law on the subject may be usefully reproduced :

"Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious :-

- (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.
- (2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.
- (3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.
- (4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.
- (5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.
- (6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.
- (7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused

regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him - perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

- (8) Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, therefore cannot be annexed with undue importance. More so when the all important "probabilities-factor" echoes in favour of the version narrated by the witnesses."

24 The ratio of various decisions cited by both the sides has been taken into consideration while deciding the appeal and it is not found necessary to deal with each decision independently as there cannot be and there is no dispute as regards the principles laid down in the decision. Ultimately it is the ratio which requires to be applied to the facts of the case which have come on record.

25 Therefore, in light of what is stated hereinbefore there is no infirmity in the judgment and order of the Sessions Court which calls for interference at the hands of this Court.

26 In the result, the appeal is dismissed with no change in the sentence imposed by the Sessions Court. Bail bonds executed as per order of admission shall stand cancelled and the Sessions Court shall take appropriate steps in accordance with provisions of Sections 388 of the Code of Criminal Procedure.

(D.A.Mehta, J)

m.m.bhatt